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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-311

RODNEY D. DRIVER, *et al.*,

Petitioners,

vs.

RICHARD HELMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS BUNDY, CARTER, DAY & WATSON IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

PAGE

Authorities Cited i

Question Presented 1

Statement of the Case 2

ARGUMENT 3

1. No Important Questions of Law 4

2. No Conflict Among the Circuits 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Avery v. *United States*, 434 F. Supp. 937 (D. Conn. 1977) 5n

Birnbaum v. *United States*, 436 F. Supp. 967 (Ed., N.Y. 1977), appeal pending (2d Cir.) 5n

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) 5

Briggs v. *Goodwin*, 569 F. 2d 1 (D.C. Cir. 1977), *petition for cert. pending sub. nom Stafford* v. *Briggs* (No. 77-1545) 6

Driver v. *Helms*, 74 F.R.D. 382 (D.R.I. 1977), aff'd in part, 577 F. 2d 147 (1st Cir. 1978) 2, 3

Driver v. *United States*, 77-C-919 (E.D.N.Y., Feb. 17, 1978) 5n

Kipperman v. *McCone*, 422 F. Supp. 860 (N.D. Cal. 1976) 3, 5, 5n

PAGE

Liberation News Service v. *Eastland*, 426 F. 2d 1379 (2d Cir. 1970) 6n

Lowenstein v. *Rooney*, 401 F. Supp. 952 (E.D.N.Y. 1975) 5, 5n-6n

Natural Resources Defense Council, Inc. v. *Tennessee Valley Authority*, 459 F. 2d 255 (2d Cir. 1972) 6n

United States v. *McAninch*, 435 F. Supp. 240 (E.D.N.Y. 1977) 5, 6n

Wilson v. *United States*, 77-C-975 (E.D.N.Y., Feb. 17, 1978) 5n

Wu v. *Keeney*, 384 F. Supp. 1161 (D.D.C. 1974) 3, 5, 5n

Statutes:

28 U.S.C. 1292(b) 3

28 U.S.C. 1391(b) 5

28 U.S.C. 1391(e) 1, 2, 3, 4, 6

Miscellaneous:

S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), 2 U.S. Code Cong. & Admin. News 2784-87 (1962) 4n

H.R. Rep. No. 536, 87th Cong., 1st Sess. (1962) 4n

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This brief is submitted by respondents, McGeorge Bundy, Marshall S. Carter, J. Edward Day and W. Marvin Watson in opposition to the petition for writ of certiorari filed on behalf of plaintiffs below, Rodney D. Driver, et al.

Question Presented

Does 28 U.S.C. §1391(e) subject private citizens, formerly employees of the federal government, to the jurisdiction and venue of every District Court in the country, regardless of where they reside, where the cause of action arose, or whether they have had any contact with the forum state?

Statement of the Case

This is a class action suit instituted in the United States District Court for the District of Rhode Island in which petitioners seek to recover in excess of one billion dollars from each of these respondents, among others, for damages to the class allegedly arising from a mail interception program operated by the Central Intelligence Agency over a twenty year period, 1953-1973.

Respondents Bundy, Carter, Day and Watson are now, and for many years before this action was commenced were, private citizens. At the time of service they resided in New York, Colorado, Maryland and California, respectively. Petitioners concede that these respondents, who were served outside Rhode Island, never had any contact with that State. (Petition, p. 5). The only specific allegations in the amended complaint with regard to these respondents are that they held certain federal offices for certain periods of time, which were 5 years, 3 years, 2½ years and 9 months, respectively. The alleged conspiracy is supposed to have started 8 to 15 years before they entered their offices and continued from 10 to 4 years after they left.

The District Court denied the motion of these respondents to dismiss for lack of personal jurisdiction and improper venue, ruling that under §1391(e) these respondents could be sued in the District Court in Rhode Island because each of them had served as a federal official at various times for relatively short periods long before this action was commenced, regardless of where the cause of action arose or whether these respondents had any contact with, or lived thousands of miles away from, the state of Rhode Island. *Driver* v. *Helms*, 74 F.R.D. 382 (D.R.I. 1977) (Appendix to Petition, pp. 21a-69a).

On an interlocutory appeal certified by the District Court, pursuant to 28 U.S.C. §1292(b), the Court of Appeals for the First Circuit, in a unanimous opinion, reversed the District Court, ruling:

> "We do not, however, find any indication in the statute itself [28 U.S.C. §1391(e)] or in the legislative history that former officials were meant to be included. We are not alone in this conclusion. *See Kipperman* v. *McCone,* 422 F.Supp. 860, 876 (N.D. Cal. 1976). *Wu* v. *Keeney,* 384 F.Supp. 1161, 1168 (D.D.C. 1974)."

Driver v. *Helms,* 577 F.2d 147, 150 (1st Cir. 1978) (Appendix to Petition, pp. 4a-5a). On the basis of the holding of the First Circuit on this single issue, which is clearly correct, this action against these respondents should be dismissed.

ARGUMENT

The instant petition, especially to the extent that it raises the question of whether §1391(e) applies to these respondents—each long divorced from government service—presents no issues worthy of certiorari. It does not present any important questions of law, nor is there a conflict among the Circuits. The petition merely calls for the review of the First Circuit's interpretation of a statute enacted by Congress, having plain language that is clear on its face and a legislative history that confirms the statute's plain meaning.

Section 1391(e), on its face, does not apply its expanded service of process provision to a former official, but only to a person who ". . . *is* an officer or employee of the United States or an agency thereof *acting* in his official capacity or under color of legal authority, . . ." (emphasis added).

The plain meaning of §1391(e) in this regard is confirmed by its legislative history. Congress adopted §1391(e) to make federal agencies and employees, not private citizens long divorced from government service, amenable to a suit locally in actions that are in essence against the United States.* There was no need to extend the scope of §1391(e) to former officials to accomplish that end and Congress did not do so.

In contending that §1391(e) applies to former officials, both petitioners and the District Court substitute their perceptions of policy for what Congress stated in §1391(e) and intended. Neither could point to any reference in the legislative history to support their reading of statute on this point. Significantly, petitioners do not dispute the First Circuit's finding that there is no indication in the statute or its legislative history that former officials were intended to come within its purview. (Petition, p. 9).

1. No Important Questions of Law

The ruling of the First Circuit does not inhibit a citizen from seeking redress of violations of constitutional rights. Petitioners, who reside one each in California, Minnesota, New York, Connecticut and Rhode Island, disingenuously assert that private citizens, unable to bring actions at their places of residence against former officials, will likely not bring suit at all to redress constitutional torts. (Petition, p. 7). To the contrary, the victims of wrongful government conduct can obtain redress in the place of their residence under §1391(e) in actions against the federal government and government officials serving in the capacities in which they performed the acts on which their liability is based.

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* *See, e.g.*, S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), 2 U.S. Code Cong. & Admin. News 2784-87 (1962); H.R. Rep. No. 536, 87 Cong., 1st Sess. (1962).

See, Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). If they choose, they may bring suit against former officials, separately or with present government officials, where the former officials reside or where the cause of action arose, pursuant to 28 U.S.C. §1391(b) and the Federal Rules. Thus, the First Circuit's rule has no real effect on a citizen's liability to redress constitutional torts.

Indeed, petitioners' conduct in this case belies their own policy argument. Notwithstanding the First Circuit's ruling, several of the named petitioners have successfully brought actions against the United States in other jurisdictions under the Federal Tort Claims Act, 28 U.S.C. §1346(b), upon the very allegations of a mail interception program that form the basis of their amended complaint.* None of these respondents were defendants in those cases.

In the 7 years since this Court's decision in *Bevins, supra*, there have been only 4 reported cases, other than the one at bar, in which the issue of plaintiffs' ability to bring suit in the places of their residence against former officials under §1391(e) has arisen. *Wu* v. *Keeney*, 384 F.Supp. 1161 (D.D.C. 1974); *Lowenstein* v. *Rooney*, 401 F.Supp. 952 (E.D.N.Y. 1975); *Kipperman* v. *McCone*, 422 F.Supp. 860 (N.D. Cal. 1976); *United States* v. *McAninch*, 435 F.Supp. 240 (E.D.N.Y. 1977).**

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* *See, e.g., Birnbaum* v. *United States*, 436 F.Supp. 967 (E.D. N.Y. 1977) appeal pending (2d Cir.); *Driver* v. *United States*, 77-C-919 (E.D.N.Y. Feb. 17, 1978); *Wilson* v. *United States*, 77-C-975 (E.D.N.Y., Feb. 17, 1978). *Avery* v. *United States*, 434 F.Supp. 937 (D. Conn. 1977).

** Petitioners err in stating that the only case in accord with the First Circuit's view of §1391 on this point is *Wu* v. *Kenney*, *supra*. In *Kipperman* v. *McCone, supra*, a case substantially identical to this action and cited by the First Circuit, (Appendix to Petition, p. 5a), the Court ruled that §1391(3) on its face and in light of its legislative history is not applicable to former officials. Indeed, there are only two decisions to the contrary. *Lowenstein*

2. No Conflict Among the Circuits

On the limited issue of whether §1391(e) applies to persons who left government employment many years before the commencement of the action, even petitioners do not seriously contend that there is a conflict among the Circuits. (Petition, p. 8). In *Briggs* v. *Goodwin*, 569 F.2d 1 (D.C. Cir. 1977), *petition for cert. pending sub nom. Stafford* v. *Briggs* (No. 77-1545), the District of Columbia Court of Appeals simply did not address the issue of whether §1391(e) applies to such former officials. No Circuit Court, other than the First Circuit, has decided the question of whether private citizens who were formerly federal officials fall within the ambit of §1391(e).

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v. *Rooney*, *supra*, had ignored the decisions of the Second Circuit that had limited §1391(e) to actions in essence against the government which, prior to 1972, could only have been brought in the District of Columbia. See *Liberation News Service* v. *Eastland*, 426 F.2d 1379 (2nd Cir. 1970); *Natural Resources Defense Council* v. *Tennessee Valley Authority*, 459 F.2d 255 (2d Cir. 1972). *United States* v. *McAninch*, *supra*, contains no independent analysis on this point, and relies solely on the District Court's decision in this case, which, of course, was subsequently overruled by the First Circuit.

CONCLUSION

For the reason stated above the petition for certiorari should be denied.

Dated: September 21, 1978

Respectfully submitted,

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